

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case Nos. 12-11076-shl

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5 In the Matter of:

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7 ARCAPITA BANK B.S.C.(C), et al,

8

9 Debtors.

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12 U.S. Bankruptcy Court

13 One Bowling Green

14 New York, New York

15

16 September 30, 2014

17 11:51 AM

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20 B E F O R E :

21 HON SEAN H. LANE

22 U.S. BANKRUPTCY JUDGE

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1 Modified Bench Ruling re: Doc. #1979 Objection Of Captain Hani Alsohaibi
2 To The Proposed Diversion Of Funds By And For The Benefit Of
3 The First Islamic Investment Bank B.S.C.(C)/Arcapita Bank
4 B.S.C.(C) Affiliates And Successors And Reservation Of
5 Rights And Request For Hearing Concerning The Administrative
6 Solvency/Insolvency Of The First Islamic Investment Bank
7 B.S.C.(C)/Arcapita Bank B.S.C.(C) Affiliates And Successors
8 Filed By Tally M. Wiener On Behalf of Hani Alsohaibi

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1 Before the Court is an application that is styled
2 objection of Captain Hani Alsohaibi to the proposed
3 diversion of funds by and for the benefit of First Islamic
4 Investment Bank B.S.C./Arcapita Bank B.S.C. affiliates and
5 successors and reservation of rights. It goes on to request
6 a hearing concerning the "administrative insolvency" of The
7 First Islamic Investment Bank B.S.C./Arcapita Bank B.S.C.
8 affiliates and successors. It's found at Docket No. 1979.

9 I also have before me an opposition by the
10 reorganized debtors to that application, as well as a reply
11 that was filed on the docket.

12 The objection complains of the alleged proposed
13 diversion of funds. It says that Arcapita seeks relief from
14 payment obligations owing under a Murabaha
15 agreement among Arcapita Investment
16 Holding Limited, Goldman Sachs International, and
17 other entities. It goes on to say that Arcapita seeks a
18 waiver from Goldman to divert \$5 million that it would
19 otherwise be obligated to pay to service its loan. It goes
20 on to complain that Arcapita is administratively insolvent.
21 And all of these statements need to be understood in the
22 context of the current posture of this case and so
23 some background is in order.

24 The debtors' assets here primarily consisted of
25 investments in operating companies and other portfolio

1 assets, including interests in joint ventures. Approximately
2 70 percent of the debtors' investments related to operating
3 companies or other portfolio assets in which the debtors
4 held directly or indirectly only minority
5 equity interests. The balance of the debtors'
6 investments related to operating companies and other
7 portfolio assets in which the debtors held directly or
8 indirectly 50 percent or more of the interests.

9 The plan of reorganization in this case that was
10 put before the Court and ultimately confirmed proposed to
11 establish a New Cayman Islands holding company, New Arcapita
12 Topco, to own and control a series of newly formed
13 intermediate holdings companies and subsidiaries, the new
14 holding companies.

15 The plan provided that the new holding companies
16 would own directly or indirectly 100 percent of the debtors'
17 assets, and in exchange for their allowed claims the
18 majority of the debtors' unsecured creditors would receive a
19 pro rata share of the new Sharia-compliant Sukuk facility,
20 substantially all of the equity of the new
21 holding companies and certain warrants issued by New
22 Arcapita Topco.

23 The reorganized Arcapita Group,
24 with the assistance of AIM Group Ltd., would
25 wind down its operations. Reorganized Arcapita Group

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1 would make distributions from the exits of investments which
2 would occur in a manner and at a time that maximized returns
3 and would be consistent with the terms of the cooperation
4 agreement, as that term is used in the plan.

5 The business plan provided for the retention of
6 AIM, which was a newly formed investment management company,
7 to manage the investment assets on a day-to-day basis.

8 These are only the top level details of the plan
9 which are set forth in far more detail in the confirmation order
10 and the plan, but are provided here only to give some
11 general sense of what happened in the case.

12 The plan was confirmed and a confirmation order
13 entered on June 17, 2013, the effective date of that plan
14 was September 17, 2013.

15 Given all of these facts, the Court is going to
16 deny the application before it for relief.

17 Although the application is styled as an objection to a proposed
18 course of action by the reorganized debtors, in fact
19 there's no current request that has been made by the reorganized
20 debtors to this Court to do anything. In fact, the Arcapita
21 case has been confirmed, so this objection is talking about
22 obligations of a reorganized debtor that is not in
23 bankruptcy court. In fact, the reorganized debtors
24 explain that the injunctive relief requested by the objector here is to prevent
25 RA Holdco 2 LLC and its co-obligors under a court-approved

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1 exit financing from obtaining a waiver of certain terms.

2 The reorganized debtors state, and I agree, that
3 this is an agreement between private parties, neither of
4 whom is in bankruptcy, and so the action here does not
5 require court approval.

6 There's some reference by the objector here that
7 the terms of the exit financing documents must be honored.
8 So, for example, the objector cites to paragraph 10(b)(iii)(B) of the final order
9 approving the exit financing that says certain modifications require
10 court approval such as those that "increase the commitments
11 or the rate of profit or fees payable thereunder," and
12 that's discussed at the reply at page 11. But there's been
13 no showing that the waiver of the condition at issue here in
14 any way triggers that requirement or any other obligation
15 under the exit financing.

16 In fact what appears to be at issue is a request
17 to waive a prepayment, that is an ability to not have to
18 honor one particular condition, but which in fact would change
19 nothing else in the obligation. So what it essentially
20 does is channel funds to the reorganized debtors to use as
21 they see fit, which the reorganized debtors
22 note is something that is being done in
23 the business judgment of the reorganized debtor and does not
24 require court approval.

25 There's been some discussion in the papers about

1 the financial health of the reorganized debtors. I don't
2 need to resolve this issue to rule on the application that
3 is in front of me, but I do think it is important to note that the
4 reorganized debtors strongly disagree with the views of
5 Captain Hani Alsohaibi on that subject. On this topic, they note
6 three things.

7 One is that the reorganized debtors sought
8 and obtained 100 percent consent of the applicable lenders for
9 the waiver of certain aspects of the prepayment provision of
10 the exit facility; second, they note that it increased, from their
11 point of view, liquidity for the reorganized debtors between
12 asset sales; and third, that from their point of view
13 they're doing better than projections set forth in the
14 disclosure statement.

15 There's also a request here to take down, so to
16 speak, a particular website, www.arcapita.com, and to
17 mandate that the case administration website should be kept
18 up to date.

19 As the reorganized debtors note, the website for
20 Arcapita was transferred to the AIM Group Ltd. as part of
21 the plan and there has been nothing identified to this Court
22 that's in the confirmation order or the plan that has been
23 violated regarding the use of the website or any other
24 aspect relating to the website, including the maintenance of
25 the case administration website. Nothing has been

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1 identified to me as violating the terms of any court order or
2 matter approved by the Court. So, that deals with
3 the issues going forward.

4 To the extent that the application seeks to
5 revisit any terms of the confirmation order I'm going to
6 deny that request. A bankruptcy court's order of confirmation is
7 treated as a final judgment with res judicata effect. *See In*
8 *re Indesco International, Inc.*, 354 B.R. 660, 664
9 (Bankr. S.D.N.Y. 2006). "Any attempt by the parties or
10 those in privity with them to relitigate any of the matters that were raised
11 or could have been raised therein is barred under the
12 doctrine of res judicata." *Sure-Snap Corporation v. State Street Bank &*
13 *Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991).

14 Courts have considered confirmation of a plan in a
15 Chapter 11 proceeding to be an event comparable to the entry
16 of a final judgment in ordinary civil litigation. *See*
17 *Silverman v. Tracar, S.A.*, 255 F.3d 87, 92 (2d Cir. 2001).

18 So for all those reasons given the record in
19 front of me on the application as well as the record of the
20 case, and that is the plan confirmation and the terms of
21 that plan, I'm going to reject the application.

22 With all that said I'd ask that the
23 reorganized debtors submit a proposed order addressing the
24 pending application and just make it clear that it's being
25 denied for the reasons stated on the record at the hearing.